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No. 91-508

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

FAHNESTOCK & CO., INC.,

Petitioner,

vs.

JOSEPH J. WALTMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The Respondent, Joseph J. Waltman, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 935 F.2d 512 (1991).

JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Federal Arbitration Act Title 9 U.S.C. §10.

STATEMENT OF THE CASE

Procedural History

The Petition of Fahnestock & Co., Inc. ("Fahnestock") seeks to overturn an arbitration award in favor of the Respondent, Joseph Waltman ("Waltman"), arising out of an arbitration proceeding initiated by Fahnestock, a New York brokerage firm. This arbitration proceeding, conducted under the auspices of and pursuant to the Rules of the New York Stock Exchange, began on November 30, 1989, and continued for eight sessions. On January 19, 1990, the arbitrators issued an award in favor of Waltman on his counterclaim of wrongful discharge and defamation against his former employer, Fahnestock. The Award included compensatory damages in the amount of $56,000.00, legal fees in the amount of $14,000.00, damages for defamation

in the amount of $100,000.00 and punitive damages in the amount of $100,000.00.

Fahnestock filed a Petition to Vacate the Arbitration Award pursuant to the Federal Arbitration Act, 9 U.S.C. §10, in the United States District Court for the Southern District of New York, thereby staying action on Waltman's Petition to Confirm the Award in the United States District Court for the Eastern District of Pennsylvania where Waltman had conducted his insurance business for Fahnestock.

In the Opinion and Order dated August 20, 1990, the District Court denied Fahnestock's Petition to Vacate the damages for defamation but vacated the punitive damage award. This Order was affirmed by the Second Circuit Court of Appeals on June 10, 1991. (Judge Mahoney dissenting on the issue of punitive damages.) Waltman filed a Petition for Rehearing which was denied on July 26, 1991.

STATEMENT OF FACTS

Joseph Waltman was hired by Fahnestock on March 15, 1982, to establish and oversee a Retirement Trust Division which would service Fahnestock's custodial retirement accounts. Waltman was terminated from his employment without notice or severance pay on December 12, 1988, two weeks before Christmas and told to leave the office immediately. The reason given for the termination was Fahnestock's alleged lack of interest in marketing insurance products, the business which Waltman developed for Fahnestock in 1985 through the establishment of a General Agency to market products for Keystone Provident Life Insurance Company, and which operated out of his office in Bala Cynwyd, Pennsylvania.

Waltman had also initiated Fahnestock's corporate licensing for insurance purposes in New York State, a process which began in June, 1987, after Waltman personally complied with New York State's individual licensing requirements in order to act as Fahnestock's insurance sub-licensee. As a further part of this licensing process, Fahnestock retained Pershing Insurance Services ("Pershing") to represent it during the licensing process and to maintain the documentation concerning agent licensing.

Shortly after Fahnestock was acquired by Edward A. Viner Holdings Ltd. in 1988, Waltman was told to relinquish his position as the sub-licensee of the corporation and to turn over all the New York State corporate licensing forms to E. Stephen Walsh. Waltman complied with these instructions and turned over the corporate licensing forms on December 8, 1988, two weeks prior to his abrupt dismissal from employment. Subsequent to his termination and after waiting three weeks to hear from Fahnestock concerning the issue of severance pay, Waltman was asked by Walsh to assist Walsh in completing the corporate licensing forms for the New York State Insurance Department and to address questions by Fahnestock's registered representatives concerning their licenses.

Waltman telephoned Walsh on January 18, 1989, to suggest that the issue of severance pay be resolved first. As Waltman set forth in his Counterclaim, the conversation with Walsh resolved nothing and Walsh told Waltman to provide him with whatever information he had concerning the registered agents and he would proceed without Waltman's assistance. Waltman stated that the files he maintained were the property of his general agency and would not be of use to Walsh. Fahnestock's response, in a telephone message delivered by Walsh on January 19, 1990, was to threaten Waltman with immediate arrest if he did not return the files by that Friday. On the advice of

counsel, Waltman wrote to Fahnestock, provided a list of agents appointed through his agency and requested a written release from each agent prior to the release of any information from his files.

Instead of complying with Waltman's request, Fahnestock filed a Statement of Claim with the New York Stock Exchange accusing him of taking files from the firm and further alleging that the files at issue were maintained at Fahnestock's request and direction. Waltman filed an answer in the N.Y.S.E. arbitration and a counterclaim. Fahnestock's allegations were completely disproved during the arbitration hearing. Fahnestock also filed an amended U-5 form with the New York Stock Exchange which stated that Waltman was terminated as a result of "business consolidation", but was also "under internal review for fraud or wrongful taking of property or violating investment-related statutes . . ." The falsity of this charge was also established during the arbitration.

During the course of eight hearings, the arbitrators heard testimony proving that the personnel files in question were readily available to Fahnestock because they were maintained by Pershing, that certain files were already in Fahnestock's possession, and that Waltman maintained only copies of documentation provided by Keystone Insurance Company concerning each registered representative. Waltman proved that Fahnestock's chairman threatened him with arrest and further established that the chairman instructed that the amended U-5 form was to be filed "in such a way as to indicate that [Waltman] had been fired for cause and noting that he had stolen property from Fahnestock," through the testimony of Edward F. O'Rourke, Fahnestock's former Managing Director. O'Rourke also testified that a blemished U-5 form would probably eliminate Waltman as a candidate for a job. Gene R. Samit, President of a subsidiary for Wilmington Trust, WDC Capital

Chargers, testified that in a discussion with Waltman regarding a job, once the question of a blemished U-5 form was mentioned, Mr. Waltman was removed from consideration. Fahnestock also tried to get Waltman to drop his counterclaim by putting pressure on his new employer, SFT Fund Group, which had a substantial business relationship with Fahnestock.

This substantive, unrebutted testimony, which represents only a small portion of a 750 page hearing transcript, convinced three arbitrators that Fahnestock's course of conduct toward Waltman warranted not only compensatory damages for wrongful discharge and defamation but substantial punitive damages. The Award of Arbitrators that Fahnestock had defamed Waltman was not based solely on the filing of the Amended Form U-5 but on Fahnestock's entire course of conduct in attempting to damage Waltman's career and reputation and pressure him to drop his counterclaim. Neither the District Court nor the Second Circuit Court of Appeals concluded that the filing of a Form U-5 is subject to an absolute privilege so as to defeat an arbitration award for defamation. To the contrary, the Second Circuit, conscious of the extremely limited scope of review of an arbitration award, recognized that the testimony established that the Amended Form U-5 was filed for the specific purpose of damaging Waltman's reputation as part of a systematic campaign to destroy Waltman's career and not for any regulatory purpose.

REASONS FOR DENYING THE WRIT

1. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

In its Petition, Fahnestock urges this Court to grant an absolute privilege to its filing of an Amended Form U-5 so as to shield Fahnestock from liability for its defamation of Waltman. However, the facts of record do not support a determination of that question by this Court. The question of whether Fahnestock was under legal compulsion to file an Amended U-5 in this particular case was, in this case, a question of fact for the arbitrators who were empowered to decide that Fahnestock did not have to file an Amended Form U-5 since there was no evidence that Waltman was under an "internal investigation" before or after his termination. There was also an admission by Fahnestock's former managing director that the Amended Form U-5 was filed for the specific purpose of damaging Waltman's reputation. This admission suggests at the very least that the filing of the Amended Form U-5 was part of a scheme to destroy Waltman's career and reputation. The arbitrators did not state their reasons for the award, nor are they required to do so. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The award of arbitrators was based on more than 750 pages of testimony concerning Fahnestock's threats and misconduct against Waltman and his current employer. Thus, even if the Court believes that Fahnestock acted under legal compulsion in filing the Amended Form U-5, it need not reach the question of whether this legal compulsion requires absolute immunity from liability. For this Court to decide the issue presented by Fahnestock would require the Court to ignore the facts of this case and the limited scope of judicial review of those facts under the Federal Arbitration Act, 9 U.S.C. §10 or the doctrine of manifest disregard of

the law. In the context of the facts of this case, the Question Presented could only be resolved by rendering an impermissible advisory opinion.

2. THE SECOND CIRCUIT'S DECISION WAS SQUARELY BASED ON ITS LIMITED SCOPE OF REVIEW OF AN ARBITRATION PROCEEDING

The Petition urges the Court to impose a severe limitation on the arbitrability of issues arising out of employment disputes in the securities industry which, under the Rules of the New York Stock Exchange, are fully arbitrable and in direct contradiction to this Court's rulings which uphold the federal policy favoring arbitration of all claims. Shearson/American Express v. McMahon, 482 U.S. 220.[1]

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[1] The Constitution, Article XI, Section 1 expressly requires arbitration of "any controversy between parties who are members, allied members or member organizations and any controversy between a member, allied member or member organization and any other person arising out of the business of such member, allied member or member organization, or the dissolution of a member organization . . ." Further, New York Stock Exchange Arbitration Rule 600 similarly requires customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization, and/or associated person in connection with his activities as an associated person . . ." Lastly, as the Second Circuit Court of Appeals noted in Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047 (2d Cir. 1989), New York Stock Exchange Arbitration Rule 347, entitled "Controversies as to Employment or Termination of Employment" broadly states:

The Question Presented ignores the narrow scope of judicial review to which arbitration proceedings are subject pursuant to the Federal Arbitration Act, Title 9 U.S.C. §10. Synergy Gas Co. v. Sasso, 853 F.2d 59 (2d Cir.), cert. denied, 488 U.S. 994 (1988). The Second Circuit Court of Appeals had previously decided in Fleck v. E.F. Hutton Group, Inc., that defamation claims arising out of Form U-5s are cognizable in N.Y.S.E. arbitration proceedings, partially in reliance on this Court's "increasingly hospitable attitude toward arbitration. Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). Other Courts of Appeal have held likewise. Merely because Fahnestock filed its Petition to vacate in federal district court on the basis of diversity jurisdiction, does not bind this Court or the Second Circuit to follow the holding of a New York intermediate appellate court that the filing of a Form U-5 is subject to an absolute privilege. Herzfield & Stern, Inc. v. Beck, 572 NYS 2d 683 (A.D. 1st Dept. 1991). See C.I.R. v. Estate of Bosch, 387 U.S. 456 (1967). Since Fahnestock's filing was arguably not the only basis on which the defamation award was made, there is no reason for this Court to decide the issue of absolute immunity based on the record below or to extend the

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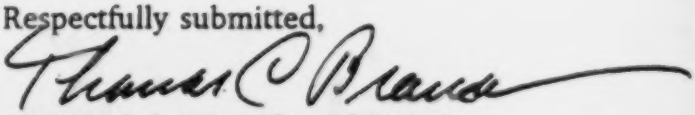
> "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such, in accordance with the arbitration procedure prescribed elsewhere in these rules." 2 N.Y.S.E. Guide (CCH) §2347 (Sept. 1988).

doctrine of absolute immunity in the context of compulsory arbitration proceedings.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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